IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE TERRY MILLER	:	CIVIL ACTION
	:	
v.	:	
	:	
EDWARD T. BRENNAN, et al.	:	No. 96-7564

MEMORANDUM AND ORDER

Yohn, J. September , 1998

On January 14, 1991, Lawrence Terry Miller pled guilty to two counts of retail theft and one count of unlawful possession of heroin in the Northampton County Court of Common Pleas. He was sentenced to eighteen to forty-eight months imprisonment for each of the retail theft counts and six to twelve months for possession of heroin. The sentences were all to be served concurrently. Petitioner did not file a direct appeal from the sentence, but he subsequently launched unsuccessful collateral attacks in several state forums.

On November 12, 1996, Miller filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1994 & Supp. 1998) in this court. That petition was dismissed on February 21, 1997 because petitioner had failed to exhaust all of the claims in state court. Miller then amended the petition to include only the one claim which had been exhausted in Pennsylvania's courts, ineffective assistance of counsel. Because that claim is without merit, I will deny Miller's petition with prejudice.

Factual and Procedural Background

Miller pled guilty to two counts of retail theft and one count of unlawful possession of heroin. Each count of retail theft was a felony of the third degree because he had three prior convictions for retail theft.[1] 18 Pa. Cons. Stat. § 3929(b)(iv) (1990); see Transcript of Guilty Pleas and Sentencing, 1-14-91, p. 2 & 15. The appropriate Pennsylvania guidelines for a minimum sentence for each count were: for the standard range, zero to twelve months; for the aggravated range, twelve to eighteen months. 204 Pa. Code §§ 303.7-303.9 (1990).

Miller's counsel, Lorenzo Crowe, Esq., had not filled out a sentencing guideline sheet prior to the sentencing, so he filled it out during a brief recess. See Transcript of Guilty Pleas and Sentencing, 1-14-91, p. 8. Crowe recommended concurrent sentences of eighteen to forty-eight months for the two counts of retail theft and time served for the possession charge. See id. at 17. The court followed this recommendation with a few modifications. See id. at 22-24.

Miller was sentenced to eighteen to forty-eight months for the two counts of retail theft and six months to one year for the possession count. See Transcript of Guilty Pleas and Sentencing, 1-14-91, p. 22-24. The sentences were to be served concurrently and the

[1] Retail theft is defined as a "[f]elony of the third degree when the offense is a third or subsequent offense." 18 Pa. Cons. Stat. § 3929(b)(iv) (1990). Miller had already committed three prior retail theft offenses, and thus the offenses he was being sentenced for were his fourth and fifth offenses.

judge specified that the time was to be served in the county prison.[2] See id. When Miller committed a subsequent violation of the law after being paroled, he had back time to serve on these retail thefts. It was after the subsequent violation that this habeas corpus petition was filed.

Petitioner did not file a direct appeal of his sentence. The issue of ineffective assistance of counsel, the only issue before this court, was raised by petitioner in his first collateral attack on his sentence filed under the Pennsylvania Post Conviction Relief Act on November 23, 1992. This petition was denied by the court of common pleas on May 25, 1993 and was not appealed. Miller also filed a quo warranto proceeding in the Pennsylvania Commonwealth Court on January 11, 1993, which was dismissed for want of jurisdiction, and a petition in state court for a writ of habeas corpus on February 5, 1993, which was dismissed as moot after the denial of the petition for post conviction relief.

Petitioner also raised the issue of ineffective assistance of counsel in his second petition under the Pennsylvania Post Conviction Relief Act, which was denied on March 3, 1995. Petitioner appealed from this decision to the superior court, which affirmed the court below on December 22, 1995. The superior court held that petitioner's sentence was not illegal as he claimed and that he had waived the claim of ineffective assistance of

[2] Under Pennsylvania law if the judge imposes a sentence with a maximum term of at least two years, but less than five years, the judge may desiginate that the sentence be served in either a county or state institution. 42 Pa. Cons. Stat. § 9762(2) (1990).

counsel because he had not appealed the first denial of post conviction relief and had not made the necessary showing of actual innocence or a miscarriage of justice to overcome the waiver. The Pennsylvania Supreme Court denied Miller's petition for allocator.

Miller's Habeas Corpus Petition

Miller filed a petition for a writ of habeas corpus in federal court on November 12, 1996. This petition was dismissed without prejudice on February 21, 1997 because all of the claims had not been exhausted in state court. Miller filed a renewed and amended petition on April 23, 1997, withdrawing all of his unexhausted claims.[3] The renewed and amended petition claims that petitioner was denied effective assistance of counsel because counsel suggested an excessive sentence. On October 31, 1997, I held an evidentiary hearing. The evidentiary hearing record includes a supplement filed on March 2, 1998. After some delay, the parties then agreed to close the evidentiary record

[3] In his original petition, Miller claimed that the conviction was obtained by an illegally induced guilty plea, that he was denied the right of appeal, that he was denied effective assistance of counsel when his counsel failed to object to an illegal sentence stipulation and that he was also denied effective assistance of counsel when counsel suggested an excessive sentence. The renewed and amended petition withdrew the first three claims. Thus, the only claim before this court is that of ineffective assistance of counsel because counsel suggested an excessive sentence.

The filing of the renewed and amended petition does not appear to be timely. The petition was dismissed without prejudice on February 21, 1997. Although the filing of the renewed and amended petition appears to be untimely, neither party has raised the issue and I will treat the renewed and amended petition as having been filed in a timely manner or as a new petition which would not be prohibited because the original petition was dismissed without prejudice. See Riley v. Taylor, 62 F.3d 86, 92 (3d Cir. 1995) (holding that leave to amend should be freely granted "when justice so requires").

and filed briefs so that this matter is now ripe for disposition. Upon review of the foregoing, the court will deny with prejudice Miller's petition for habeas corpus.

I. STANDARD OF REVIEW

The federal habeas corpus statute, 28 U.S.C. § 2254, provides that a district court will consider a petition for a writ of habeas corpus presented by an individual "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). This section further provides that a district court need not consider a petition unless the petitioner has fulfilled certain requirements, such as having "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A).

II. DISCUSSION

A. **Exhaustion Requirement**

A federal court will generally dismiss a petition for a writ of habeas corpus if petitioner has not adequately presented each claim to the highest state court empowered to consider it. See Castille v. Peoples, 489 U.S. 346, 349-51 (1989). Section 2254 of the United States Code states that "[a]n applicant shall not be deemed to have exhausted the remedies available in the [state] courts, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c).

Petitioner's renewed and amended petition presents only one claim, that of

ineffective assistance of counsel, which has been exhausted. There is, however, an issue of procedural default with respect to this sole claim.

B. **Procedural Default**

The federal courts will not entertain a petition for a writ of habeas corpus based on a claim which was denied in the state courts based on an independent and adequate state procedural ground. See Coleman v. Thompson, 501 U.S. 722, 750 (1991).

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. This is known as the doctrine of procedural default. Id. at 729-30. Miller's claim of ineffective assistance of counsel was procedurally barred in Pennsylvania because he failed to appeal the denial of his first post conviction relief petition. Commonwealth v. Miller, No. 950-1995, (Pa. Super. Ct. 1995). Thus, Miller's claim of ineffective assistance of counsel has been procedurally defaulted.

Further, Miller has made no allegation of cause and prejudice or actual innocence, which would be necessary to overcome the procedural default. See Coleman, 501 U.S. at 750. Thus, the procedural default has not been excused.

C. **Ineffective Assistance of Counsel Claim**

Even if there had not been a procedural default, however, the petition would be

denied because the claim of ineffective assistance of counsel is without merit. The Sixth Amendment of the United States Constitution guarantees criminal defendants assistance of counsel at their trials. U.S. Const. amend. VI. The purpose of this constitutional guarantee is to make sure that the trial is fair. Strickland v. Washington, 466 U.S. 668, 686 (1984). Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. If the fairness of the judicial process is not in question, then the Sixth Amendment right to counsel is not implicated. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

To establish ineffective assistance of counsel, two components must be shown. Strickland, 466 U.S. at 687. First, petitioner must demonstrate that counsel made errors of sufficient magnitude that the Sixth Amendment guarantee of counsel is implicated, which would require that counsel's errors call the trial's fairness into question. Id. Second, counsel's deficiencies must have prejudiced petitioner, by "depriv[ing] [petitioner] of a fair trial." Id. The Strickland two-part test also applies to judging whether counsel was effective in the guilty plea process. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). In the context of a guilty plea, petitioner "must show that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

Petitioner claims that his counsel was ineffective in that he suggested to the court

an excessive sentence, with respect to the two counts of retail theft. Miller's counsel, Lorenzo Crowe[4], Esq., advised Miller to plead guilty and advised him of the maximum potential sentence for the charges. See Transcript of Evidentiary Hearing, 10-31-97, p. 52 & 67. Crowe did not suggest to Miller what sentence he thought Miller would get by pleading guilty, but he explained to him that he feared that if Miller went to trial he might get the maximum sentence.[5] See id. at 67, 73-75, 79.

Counsel did not prepare a sentencing guideline sheet prior to the sentencing, instead he filled it out during a recess. See Transcript of Guilty Pleas and Sentencing, 1-14-91, p. 2 & 15. Miller, after reviewing the guideline sheet, agreed that he still desired to plead guilty. See id. Counsel then suggested to the court that the sentence should be "a range of eighteen months to forty-eight months" and time served for the possession charge. Id. at 17. The court sentenced Miller to eighteen to forty-eight months for each retail theft count and six months to one year for the possession count, all to be served concurrently. See id. at 22-23. Counsel recalls that he suggested the eighteen to forty-eight months figure because he had informally discussed the sentence with Judge Hogan

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[4]Lorenzo Crowe, Esq., a graduate of Harvard Law School, was admitted to practice law in Pennsylvania in 1976. See Transcript of Evidentiary Hearing, 10-31-97, p. 43-44. He had extensive experience in criminal law and estimated that approximately 70% of his practice since 1978 was in criminal law and that he had conducted 120 criminal jury trials. See id.

[5] Crowe stated at the evidentiary hearing that he feared that if Miller went to trial and was found guilty, Miller would get the maximum sentence of 3 ½ 7 years for each count of retail theft, to be served consecutively rather than concurrently. See Transcript of Evidentiary Hearing, 10-31-97, p. 79-80.

and the Assistant District Attorney, and that sentence had been suggested during that discussion. See Transcript of Evidentiary Hearing, 10-31-97, p. 65 & 73. Thus, Crowe "adopted" a sentence suggestion which he recalled that the judge had "fostered." See id. at 59. Neither Judge Hogan nor the ADA recalls this conversation, but there are other tactical reasons why counsel suggested such a sentence.[6] Miller had a drug problem and agreed that this drug problem was the cause of his criminal acts. See Transcript of Guilty Pleas and Sentencing, 1-14-91, p. 10-12. Thus, Miller wanted to enter a structured drug program, which would require that long a sentence.[7] See id. at 17-22. Further, the sentences, which could have been imposed consecutively, were instead imposed concurrently. Additionally, it was within the court's discretion to sentence Miller to the state penitentiary rather than the county prison. Thus, counsel's suggestions easily fall within an objective standard of reasonable professional conduct, if he thought by suggesting this sentence he could achieve these tactical advantages for his client.

Miller claims that the sentence which Crowe suggested to the court was excessive and that the sentencing guidelines were incorrectly applied to him, with regard to the two counts of retail theft. Miller alleges that, as a result of counsel's errors, his sentence was beyond the maximum which could be imposed. This is based on an incorrect reading of

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[6] It is irrelevant that Judge Hogan and the Assistant District Attorney do not recall this conversation because even if no such conversation took place, there were sufficient tactical reasons for Crowe's suggestion of an eighteen to forty-eight months sentence.

[7] Petitioner had already served six months in prison. The type of drug program anticipated would require another twelve months.

the sentencing guidelines. The sentencing guidelines only give the range of minimum confinement. See 204 Pa. Code § 303.9 (1990). The guidelines say nothing of the maximum sentence, the issue of most importance to the petitioner now. Moreover, the appropriate minimum for each count of retail theft was zero to twelve months for the standard range and twelve to eighteen months for the aggravated range. See id. Thus, Miller's minimum sentence of eighteen months could easily have been worded to fall within the standard range, because Miller committed two counts of retail theft, each graded a felony of the third degree because he had committed three prior offenses. See 18 Pa. Cons. Stat. § 3929(b)(iv). Thus, a nine months minimum for each count to be served consecutively, which is well within the standard range, would result in the eighteen month minimum sentence. Alternatively, the sentencing judge could have sentenced Miller in the aggravated range because there were two counts of retail theft and they were his fourth and fifth offenses rather than just his third offense, and Miller was also being sentenced for possession of heroin. Thus, Miller's sentence was not excessive and was not the result of a misapplication of the sentencing guidelines.

When evaluating the first component of the Strickland test, the court must look to whether "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687. Counsel's representation of Miller in no way demonstrates ineffective or objectively unreasonable legal counsel. There is no one correct way to represent a client and counsel must have latitude to make tactical decisions. See id. at

689; see also Lewis v. Mazurkiewicz, 915 F.2d 106, 115 (3d Cir. 1990) ("[W]hether or not some other strategy would have ultimately proved more successful, counsel's advice was reasonable and must therefore be sustained."). Crowe's sentencing suggestion was reasonable. It took into consideration Miller's need for a meaningful amount of time in a drug program and kept Miller in the county prison rather than the state penitentiary.

The second component of the Strickland test requires that the petitioner "show that [counsel's] deficient performance prejudiced the defense" so seriously that the petitioner did not receive a fair trial. Strickland, 466 U.S. at 687. Here, the fairness of the guilty plea and sentencing process is being evaluated. Counsel advised Miller that if he went to trial there was a possibility that the maximum sentence would be imposed. See Transcript of Evidentiary Hearing, 10-31-97, p. 67, 73-75 & 79. At sentencing, counsel recommended that the court impose a sentence which was more than the minimum, but also far less than the maximum. See Transcript of Guilty Pleas and Sentencing, 1-14-91, p. 17. Sentencing was in the court's discretion, and counsel had tactical reasons for the suggestion made. Thus, Miller cannot demonstrate that counsel's performance prejudiced him. Further, according to Hill v. Lockhart, in the guilty plea process, the petitioner "must show that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985). Miller does not allege that counsel's alleged errors induced his guilty plea, and therefore, under Hill, his allegations were insufficient to amount to Strickland prejudice. See id. at 60.

III. CONCLUSION

Crowe's representation of Miller was appropriate and more than meets the standard of objective reasonableness set forth in Strickland. Further, Miller's sentence was appropriate, and therefore, Miller suffered no prejudice as a result of Crowe's representation. Thus, because petitioner has not demonstrated that either component of the Strickland test was met, a valid claim of ineffective assistance of counsel does not exist. An appropriate order follows.

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LAWRENCE TERRY MILLER	:	CIVIL ACTION
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ORDER

Yohn, J. September , 1998

AND NOW, this day of September 1998, upon consideration of the petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 and the petitioner's brief in support of the petition, the response to the habeas petition, the evidentiary hearing and the supplement to the evidentiary hearing, it is hereby ORDERED that:

1. The petition for writ of habeas corpus is DENIED with prejudice and;

2. There is no substantial showing sufficient to issue a certificate of appealability.

William H. Yohn, Jr., J.